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No. 90-1279

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

MYRA JO COLLINS,

Petitioner,

vs.

THE CITY OF HARKER HEIGHTS, TEXAS,

Respondent.

On Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. When a municipal employee suffers workplace personal injuries and files a Section 1983 claim against his employer which alleges no violation of the Bill of Rights, no invidious discrimination, and no infringement of the right of privacy, is abuse of governmental power a necessary aspect of the cause of action?

2. Do state statutes regulating workplace safety create substantive due process rights enforceable under Section 1983?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. A PERSONAL INJURY CLAIM ASSERTED AS A DUE PROCESS INVASION OF BODILY SECURITY DOES NOT STATE A CAUSE OF ACTION UNDER 42 U.S.C. SECTION 1983 UNLESS THE COMPLAINT PLEADS AN ABUSE OF GOVERNMENT POWER	4
A. The Origins of Section 1983	6
B. This Court and the Lower Courts Have Recognized that an Abuse of Governmental Power is a Necessary Element of a Section 1983 Case	9
C. Policy Considerations Underlying Federalism Demand a Clear Demarcation Between Torts and Constitutional Violations	17
II. THE TEXAS HAZARD COMMUNICATION ACT DOES NOT CREATE A SUBSTANTIVE DUE PROCESS LIBERTY INTEREST OR "ENTITLEMENT" FOR MUNICIPAL EMPLOYEES	21
CONCLUSION	28

TABLE OF AUTHORITIES

Cases	Page
Board of Pardons v. Allen, 482 U.S. 369 (1987)	22
Board of Regents v. Roth, 408 U.S. 564 (1972)	22
Bowers v. Hardwick, 478 U.S. 186 (1986)	25
City of Canton, Ohio v. Harris, 489 U.S. 378 (1989)	5, 14, 15, 16, 18
City of St. Louis v. Praprotnik, 485 U.S. 112 (1988)	18
Collins v. City of Harker Heights, Texas, 916 F.2d 284 (1990)	*passim*
Cort v. Ash, 422 U.S. 66 (1975)	24, 25
Daniels v. Williams, 474 U.S. 327 (1986)	12, 27
Davidson v. Cannon, 474 U.S. 344 (1986)	9, 12
de Jesus Benavides v. Santos, 883 F.2d 385 (5th Cir. 1989)	13
DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989)	9, 12
Gomez v. Toledo, 446 U.S. 635 (1980)	13
Greenwood v. Peacock, 384 U.S. 808 (1966)	18
Harmelin v. Michigan, 59 U.S. Law Week 4839 (June 27, 1991)	25
Hogan v. City of Houston, 819 F.2d 604 (5th Cir. 1987)	13
Hudson v. Palmer, 468 U.S. 517 (1984)	26
Ingraham v. Wright, 430 U.S. 651 (1977)	26, 27
Martinez v. California, 444 U.S. 277 (1980)	9, 24

TABLE OF AUTHORITIES – Continued

PAGE

McClary v. O'Hare, 786 F.2d 83 (2d Cir. 1986) 13

Mills v. Rogers, 457 U.S. 291 (1982) 22

Missouri v. Jenkins, 110 S.Ct. 1651 (1990) 24

Monell v. Department of Social Services, 436 U.S. 658 (1978) 7, 8, 17, 18, 19

Monroe v. Pape, 365 U.S. 167 (1961) 7, 9, 10

New State Ice v. Liebman, 285 U.S. 262 (1932) 24

Oklahoma City v. Tuttle, 471 U.S. 808 (1985) 17, 18

Parratt v. Taylor, 451 U.S. 527 (1981) 12, 13, 19, 26

Paul v. Davis, 424 U.S. 693 (1976) 10, 11, 15, 17, 18

Pembaur v. City of Cincinnati, 475 U.S. 469 (1986) 17

Perry v. Sinderman, 408 U.S. 593 (1972) 22

Pickering v. Board of Education, 391 U.S. 563 (1968) 13

Railway Express Agency v. New York, 336 U.S. 106 (1949) 24

Rankin v. City of Wichita Falls, Texas, 762 F.2d 444 (5th Cir. 1985) 13, 28

Regents of University of Michigan v. Ewing, 474 U.S. 214 (1985) 22, 26

Robertson v. Wegmann, 436 U.S. 574 (1978) 12

Rochin v. California, 342 U.S. 165 (1952) 17

Ruge v. City of Bellevue, 892 F.2d 738 (8th Cir. 1989) 13, 16

Stewart Machine v. Davis, 301 U.S. 548 (1937) 24

United States v. California, 279 U.S. 175 (1936) 21

TABLE OF AUTHORITIES – Continued

PAGE

Walker v. Rowe, 791 F.2d 507 (7th Cir.), *cert. denied*, 479 U.S. 994 (1986) 13

Washington v. District of Columbia, 802 F.2d 1478 (D.C. Cir. 1986) 13

Wilson v. Seiter, 59 U.S. Law Week 4871 (June 17, 1991) 18

Yick Wo v. Hopkins, 118 U.S. 356 25

CONSTITUTION OF THE UNITED STATES

First Amendment 6, 13

Fourth Amendment 6

Fifth Amendment 6, 23

Eighth Amendment 6

Thirteenth Amendment 21

Fourteenth Amendment 8, 10, 11, 12, 19, 21

STATUTES

42 U.S.C. § 1983 ..... *passim*

TEX. CIV. PRAC. & REM. CODE ANN. § 101.024 (Vernon 1986) 2

TEX. HEALTH & SAFETY CODE ANN. §§ 502.00 et seq. (Vernon 1991) 21

TEX. REV. CIV. STAT. ANN. art. 8306 (Vernon Supp. 1991) 1, 2

TABLE OF AUTHORITIES – Continued

PAGE

OTHER AUTHORITIES

S. Bandes, *Distinguishing a Custom or Policy from a Random, Unauthorized Act*, 72 IOWA L.REV. 101 (1986) 19

H. Blackmun, *Federal Protection of Individual Rights – Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L.REV. 1 (1985) 12

Cong. Globe, 42d Cong. 1st Sess. 299, 374, 519 (1871) 7, 8

Developments in the Law: Section 1983 and Federalism, 90 HARV. L.REV. 1133 (1977) 8

E. Foner, RECONSTRUCTION (1988) 7

B. Kritchevsky, *"Or causes to be Subjected": The Role of Causation in Section 1983 Municipal Liability Analysis*, 35 UCLA L.REV. 1187 (1988) 7

A. Larson, THE LAW OF WORKMEN'S COMPENSATION (1988) 2

H. Monaghan, *Of "Liberty and Property"*, 62 CORNELL L.REV. 405 (1977) 27

J. Randall & D. Donald, THE CIVIL WAR AND RECONSTRUCTION (2d ed. 1969) 8

M. Wells & T. Eaton, *Substantive Due Process and the Scope of Constitutional Torts*, 18 GA. L.REV. 201 (1984) 15

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vs.

THE CITY OF HARKER HEIGHTS, TEXAS,

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On Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

Larry Michael Collins, an employee of the City of Harker Heights ("City") Sanitation and Sewer Department, died of asphyxia due to oxygen deprivation while performing his municipal duties. According to Petitioner's complaint, Collins's tragic death was caused by the City's conscious failure to train which amounted to a deliberate indifference to his constitutional rights.

Petitioner filed for workers' compensation benefits. As the claim was uncontested,[1] she began receiving

[1] Because the claim was uncontested by the City, no attorney's fees may be paid out of the claim. TEX. REV. CIV. STAT. ANN. art 8306 § 7d (Vernon Supp. 1991) (repealed effective January 1, 1991).

payments immediately.[2] Thereafter Petitioner filed this Section 1983, 42 U.S.C. § 1983 (Supp. 1991), action against the City.[3] Because neither the Bill of Rights nor an invidious discrimination nor the right of privacy were involved, the district court dismissed the claim, holding that under no set of facts could Petitioner prove the abuse of governmental power that was necessary to state a claim.

Since Petitioner did not and could not properly allege or show an abuse of government power, i.e., that the City

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[2] There being no children, Petitioner receives two-thirds of her husband's average weekly wage at the time of his death for the rest of her life. TEX. REV. CIV. STAT. ANN. art. 8306 § 8a (Vernon Supp. 1991) (repealed effective January 1, 1991). If she remarries, payments will cease after she receives two years of the workers' compensation benefits in a final lump sum payment. TEX. REV. CIV. STAT ANN. art 8306 § 8(b) (Vernon Supp. 1991) (repealed effective January 1, 1991).

[3] In exchange for providing compensation to workers for work-related injuries without regard to fault, the workers' compensation laws preclude an action against an employer for compensatory damages based on negligence. TEX. REV. CIV. STAT. ANN. art. 8306 § 3a (Vernon Supp. 1991) (repealed effective January 1, 1991). A private employer in Texas may not be sued for exemplary damages based on a gross negligence theory unless a death is involved; if a death is involved, the private employer may be sued for gross negligence and exemplary damages. A suit for exemplary damages based on gross negligence is unique to Texas; other states permit such a suit only when the injury is caused by the intentional conduct of the employer. A. Larson, THE LAW OF WORKMEN'S COMPENSATION § 68.13 (1988). A government employer in Texas has sovereign immunity from gross negligence claims and exemplary damages. TEX. CIV. PRAC. & REM. CODE ANN. § 101.024 (Vernon 1986).

acted against the decedent as governed, the Fifth Circuit held that Petitioner had not stated a Section 1983 claim. With a conflict among the circuits, this Court granted certiorari.

SUMMARY OF ARGUMENT

This lawsuit involves a workplace injury. Solely because the City is a government entity, Petitioner attempts to turn an ordinary tort into a generalized due process violation of invasion of bodily sanctity. To transform an ordinary tort, with its state law boundaries and remedies, into a constitutional violation would radically distort the operation of federalism. Thus, when a plaintiff suffers a personal injury and sues a government entity for a deprivation of due process, proof of abuse of governmental authority is an essential element of the claim.

I. Neither the legislative history, decisions of this Court, nor policy considerations support turning Section 1983 into a supplement for workers' compensation in personal injury cases where there is no abuse of governmental power. Section 1983 was adopted against the background of the breakdown of law in the Reconstruction South and the ceding of governmental authority to the Ku Klux Klan as a means of terrorizing the newly freed slaves and their supporters. Thus, as Justice Marshall stated for the Court, the policy considerations underlying Section 1983 were compensation for injury and "prevention of abuses of power." *Robertson v. Wegmann*, 436 U.S. 574, 591 (1978). Were it otherwise, Section 1983 would be turned into a font of tort law at the

expense of the primacy of the states in dealing with injuries whether caused by private or governmental actors. This Court has consistently recognized that considerations of federalism require a clear demarcation between an ordinary tort and a constitutional violation. Abuse of governmental power is an essential ingredient of that demarcation. If Petitioner can get to a jury without a showing of abuse of authority, then the line between constitutional violations and ordinary tort will be hopelessly blurred.

II. State statutes do not create substantive constitutional rights. However obvious the point is, it has eluded Petitioner, who claims that the Texas Hazard Communications Act creates rights which are protected by substantive due process. This novel argument is another direct assault on federalism. It makes constitutional rights turn on the happenstance of residence and ignores the constitutional right of Texans to choose whether to have such a statute as well as the desired level of its enforcement.

ARGUMENT

I. A PERSONAL INJURY CLAIM ASSERTED AS A DUE PROCESS INVASION OF BODILY SECURITY DOES NOT STATE A CAUSE OF ACTION UNDER 42 U.S.C. SECTION 1983 UNLESS THE COMPLAINT PLEADS AN ABUSE OF GOVERNMENT POWER

This is a case about the necessary attributes of a Section 1983 claim when a generalized deprivation of due process (rather than infringement of a specific constitutional guarantee) is involved. In these circumstances,

when a plaintiff's claim is invasion of bodily security, the case may, and likely will, mirror an ordinary personal injury tort. Accordingly, it is essential to have a mechanism for separating a constitutional violation of due process from an accident where relief is the exclusive province of state law.

The differences between the parties and the various amici reflect a deep division over the proper scope of the constitutional tort as a regulator of the employment relationship of millions of public employees and their governmental employers. Petitioner's argument can be simply stated. Whenever an injury is caused by a governmental entity with the requisite degree of fault then there is a constitutional violation and a Section 1983 action lies. Acknowledging that this Court has attempted to separate ordinary governmental torts from Section 1983's constitutional torts, Petitioner argues that the heightened fault standard of *City of Canton v. Harris*, 489 U.S. 378 (1989), is this Court's chosen vehicle for maintaining the boundary. Under Petitioner's theory, if a plaintiff alleges deliberate indifference in an otherwise ordinary tort case against a governmental entity, then he has a constitutional claim for a deprivation of due process; any lesser degree of fault remains an ordinary non-constitutional tort. Nothing in Petitioner's argument turns on the specific facts of Collins's injury; rather it is the City's alleged deliberate indifference to training which creates the constitutional violation. Under Petitioner's argument, had Collins escaped from the sewer with a broken bone or merely a bruise, the City's prior behavior would have been no less culpable (and no less the cause of injury), and therefore the constitutional violation would have been the same.

This argument does maximum damage to both federalism (a concept – even a word – conspicuously absent from Petitioner's Brief) and the Constitution. On the one hand it stigmatizes the City not as a mere tortfeasor, but as a violator of the United States Constitution. On the other hand it trivializes the Constitution by making it do service as a supplement to state tort and workers' compensation remedies when the great concerns of the Constitution – restraining and channelling governmental power – are absent. Section 1983 requires no such result. Indeed, its legislative history, interpretations by this Court, and policy considerations all support the conclusion reached by the Courts below: When a specific constitutional right is not at issue, proof of an abuse of governmental power is an essential ingredient of the constitutional tort.[4]

A. THE ORIGINS OF SECTION 1983

The legislative history of Section 1983 is a testament to the abuse of governmental power in the South. It offers no support for Petitioner's position that Section 1983 applies to every personal injury committed by government so long as the requisite fault can be proven.[5] In light of the legislative history of Section 1983, it is not surprising that Petitioner makes no effort beyond a pair of

[4] Violations of the First, Fourth, Fifth, and Eighth Amendments, invidious discriminations, and infringements of the right of privacy *ipso facto* constitute abuses.

[5] The erroneous premise is that, if a high enough level of fault exists, § 1983 cannot become a font of tort law. Petitioner's Brief at 17.

quotations from the debates to discuss the origins of the statute.

The Ku Klux Klan commenced a "campaign of terror"[6] as the 1870's began. State and local officials in many parts of the South either joined with Klansman or tacitly ceded the coercive powers of government to the Klan. This forms the background for the adoption of Section 1983. *Monroe v. Pape*, 365 U.S. 167, 172-84 (1961); *Monell v. Department of Social Services*, 438 U.S. 658, 665-89 (1978). Nevertheless, it warrants brief repeating because this history speaks so clearly to the issue of abuse of governmental power. A 600 page Senate Report, S.Rep. No. 1, 42d Cong. 1st Sess., cited with frequency during the Congressional debates, describes increasing violence against newly freed slaves and their supporters despite the recent adoption of constitutional amendments and two Force Acts.

On March 23, 1871, President Grant requested emergency legislation to deal with the virtual state of anarchy in the South. Cong. Globe, 42d Cong., 1st Sess. 299 (1871). Less than a month later Congress enacted the requested legislation, Section 1 of which is the current Section 1983. While the debates are "sparse,"[7] the "legislators who proposed the bill saw themselves confronted not with common felonies but with a concerted plan of organized

[6] E. Foner, RECONSTRUCTION 454 (1988).

[7] B. Kritchevsky, *"Or causes to be Subjected": The Role of Causation in Section 1983 Municipal Liability Analysis*, 35 UCLA L.REV. 1187, 1194 (1988); *Monell*, 436 U.S. at 665.

violence."[8] Representative Shellaberger thought it nothing less than an effort "aimed at the overthrow of all the political rights of four million of the American citizens [in the South], and of all constitutions and laws made in defense of them." Cong. Globe, 42d Cong., 1st Sess. at 519. The plight of newly freed slaves and their supporters in the South was exacerbated by the inaction of state and local governments. As Representative Lowe noted: "While murder is stalking abroad in disguise, while whippings and lynchings and banishment have been visited upon unoffending American citizens, the local administrations have been found inadequate or unwilling to apply the proper corrective."[9] Cong. Globe, 42d Cong., 1st Sess. at 374. The Act of April 20, 1871, aptly titled "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States and for other Purposes", 17 Stat. 13, was hoped to be that proper corrective. Section 1 was directed to governmental lawlessness thereby protecting Fourteenth Amendment rights; the " 'other purpose' [was] suppressing Ku Klux Klan violence," *Monell*, 436 U.S. at 665, and the remaining sections attempted to facilitate that.[10]

There is no doubt either in 1871 or now, 120 years later, that Congress intended Section 1983 to remedy

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[8] *Developments in the Law: Section 1983 and Federalism*, 90 HARV. L.REV. 1133, 1154 (1977).

[9] The remarks of Representative Sheldon, quoted in Petitioner's Brief at 35, are from this part of the debate and go to this point.

[10] J. Randall & D. Donald, THE CIVIL WAR AND RECONSTRUCTION 684 (2d ed. 1969).

abuses of governmental power. Congress was attempting to regulate – and regulate forcefully – the relation of government to its citizens generally. Section 1983, as it implements the Due Process Clause "was intended to prevent government 'from abusing [its] power, or employing it as an instrument of oppression.' " *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 196 (1989) (quoting *Davidson v. Cannon*, 474 U.S. 344, 348 (1986)). If the forces of law enforcement behaved lawlessly or were deliberately indifferent to the rights of citizens, then a federal remedy would be available. When the government brings the force of law to bear on its citizens, it must do so in conformity to federal standards. Thus Petitioner notes, Brief at 31, that the typical personal injury Section 1983 case, from *Monroe v. Pape* to *City of Canton v. Harris*, involves the governance of the municipal police force. By contrast, Section 1983 was never intended nor has it ever been construed by this Court, to be a font of tort law, a supplement to workers' compensation, or a general law regulating workplace safety. To so construe it would ignore its origins, trivialize its essential purposes, and radically distort the nature of our federal system. *Martinez v. California*, 444 U.S. 277, 282 (1980).

B. THIS COURT AND THE LOWER COURTS HAVE RECOGNIZED THAT AN ABUSE OF GOVERNMENTAL POWER IS A NECESSARY ELEMENT OF A SECTION 1983 CASE

Abuse of power is central to the demarcation between ordinary tort and constitutional tort. When a plaintiff alleges a specific constitutional violation, such as

the illegal search and seizure of *Monroe v. Pape*, demarcation is simple even though there is overlap between Section 1983 and the common law. But when a plaintiff alleges an injury based on governmental fault and ties the two with a generalized due process claim, then federalism demands justification for treating a common law tort as a constitutional issue. Only when a government uses and abuses its coercive powers, is that justification present.

Paul v. Davis, 424 U.S. 693 (1976) was the initial attempt to convert an ordinary tort into a constitutional tort. Plaintiff complained that his reputation had been injured by a circular listing him as an active shoplifter when, in fact, he had never been convicted of the crime. Noting that plaintiff's complaint "would appear to state a classic claim for defamation actionable in the courts of virtually every State," 424 U.S. at 697, the Court addressed the implications of finding that a Section 1983 action would lie. This "construction would seem almost necessarily to result in every legally cognizable injury which may have been inflicted by a state official acting under 'color of law' establishing a violation of the Fourteenth Amendment." *Id.* at 698. Quite naturally the Court recoiled from such a revolutionary transformation of federalism that would "extend to [everyone] a right to be free of injury whenever the State may be characterized as the tortfeasor. [S]uch a reading would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States." *Id.* at 701. It would add to the congestion of the federal courts, radically change the nature of the

federal system and fly in the face of prior understandings of the Fourteenth Amendment.

Petitioner herein is again asking this Court to have Section 1983 do service as a constitutional supplement to ordinary tort law. Just as in *Paul v. Davis*, Petitioner "has pointed to no specific constitutional guarantee safeguarding the interest he asserts has been invaded." *Id.* at 700. Neither freedom of expression nor freedom of conscience were involved. There was no illegal search and seizure, no invasion of the sanctity of the family, no racial or gender discrimination, no decision without a fair hearing. There was an on the job injury, something newspapers report in their communities with regularity. However tragic that loss was, just as in *Paul v. Davis*, there was no constitutional violation. Just a tort.

Given the similarities between the theories of plaintiff in *Paul v. Davis* and the instant case, one would expect more than a single citation to that case in Petitioner's Brief. Mentioned, but not confronted, Petitioner would gut *Paul v. Davis* by the introduction of the deliberate indifference standard of fault. Yet wherever deliberate indifference falls along the continuum of fault, it is less than intentional conduct, and intentional conduct was involved and admitted in *Paul v. Davis*. *Id.* at 717 (Brennan, J. dissenting). Ignoring the need for use of the coercive power of the state (which was not present in *Paul v. Davis* and therefore assists in explaining the Court's hostile reaction to federalizing tort law), Petitioner would reduce *Paul v. Davis* to a historical footnote while massively expanding the range of constitutional tort.

But *Paul v. Davis* and federalism would not be the sole casualties from Petitioner's claim. This Court has consistently recognized the relationship of Section 1983 and abuse of governmental power because, as Justice Marshall noted for the Court, the "policies underlying Section 1983 include compensation of persons injured by deprivation of federal rights and prevention of abuses of power by those acting under color of state law." *Robertson v. Wegmann*, 436 U.S. 574, 591 (1978). More recent cases have been equally explicit about the interrelation of due process and abuse of power. *E.g., DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 196 (1989) ("the Due Process Clause of the Fourteenth Amendment was intended to prevent government 'from abusing [its] power, or employing it as an instrument of oppression' ") (quoting *Davidson v. Cannon*, 474 U.S. 344, 348 (1986)); *Daniels v. Williams*, 474 U.S. 327, 331 (1986) ("to secure the individual from the arbitrary exercise of the powers of government" and "to prevent governmental power from being 'used for the purposes of oppression' ") (internal citations omitted); *Parratt v. Taylor*, 451 U.S. 527, 549 (1981) (Powell, J. concurring) (to prevent the "affirmative abuse of governmental power"); *see also* H. Blackmun, *Federal Protection of Individual Rights – Will the Statute Remain Alive or Fade Away?* 60 N.Y.U. L.Rev. 1, 3 (1985) (Section 1983 designed to prevent abuse of "coercive state power").

The circuit courts who, with the district courts, see the vast array of Section 1983 claims, have fully understood the need for requiring abuse of power when addressing due process claims. In the five years prior to the instant case, the Fifth Circuit has been called to

address similar issues three separate times. *de Jesus Benavides v. Santos*, 883 F.2d 385 (5th Cir. 1989); *Hogan v. City of Houston*, 819 F.2d 604 (5th Cir. 1987); *Rankin v. City of Wichita Falls*, 762 F.2d 444 (5th Cir. 1985). The Second, Seventh, and District of Columbia Circuits have also addressed the issue and held that, under similar factual circumstances, an employee does not have a cause of action under Section 1983 for on the job injuries. *McClary v. O'Hare*, 786 F.2d 83 (2d Cir. 1986); *Walker v. Rowe*, 791 F.2d 507 (7th Cir.), *cert. denied*, 479 U.S. 994 (1986); *Washington v. District of Columbia*, 802 F.2d 1474 (D.C. Cir. 1986). Only the Eighth Circuit, with its decision in *Ruge v. City of Bellevue*, 892 F.2d 738 (8th Cir. 1989), has held that abuse of power is irrelevant to an employment injury.[11]

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[11] Petitioner concludes from *Gomez v. Toledo*, 446 U.S. 635 (1980) that all circuits save the Eighth have failed to follow clear and settled law. The unexceptional holding of *Gomez* is that a plaintiff need not anticipate (and therefore negate in advance) an affirmative defense. Petitioner instead relies on the statement that a § 1983 plaintiff need only plead (1) deprivation of a constitutional right (2) by a state actor. 446 U.S. at 640. Petitioner recognizes that, in addition to those two requirements, a plaintiff must also plead the requisite fault, but never takes the next step to distinguish between a violation of a specific constitutional provision (such as the First Amendment claim in *Pickering v. Board of Education*, 391 U.S. 563 (1968)) and an injury claimed to be a deprivation of due process. In the latter (and instant) case the requirement of pleading a deprivation of a constitutional right makes it essential that plaintiff demonstrate at the outset that the case involves "affirmative abuse of power," *Parratt*, 451 U.S. at 549 (Powell, J. concurring). The Fifth Circuit may have been overly technical in stating that abuse of power was an independent aspect of a § 1983 action rather than an essential ingredient of a

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Petitioner views *City of Canton v. Harris* as having changed all the foregoing. From her perspective *City of Canton* holds that a municipality is liable under Section 1983 for all injuries caused by its deliberate indifference to training. *City of Canton* accomplishes no such revolution. Not surprisingly, as its facts illustrate, it rests on the use of coercive powers of government. Harris had been arrested by the police. While in custody she slumped to the floor on two occasions. The police, rather than obtain medical aid, left her on the floor the second time to prevent her from falling again. She alleged that her injuries stemmed from lack of appropriate medical attention and that in turn had been caused by the city's deliberate indifference to the training of its police.

Because Harris was in custody, she was not free to leave or call for medical attention on her own. Equally important, custody separated Harris from friends and loved ones (and others) who could have provided assistance when she needed medical attention. Under the coercive circumstances of custody, the city breached a constitutional duty. "We hold today that the inadequacy of police training may serve as the basis for Section 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." 489 U.S. at 388. *City of Canton* is not an employee safety case nor any other all-purpose

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generalized due process claim, but in either event, as the District Court's opinion in the instant case shows, a plaintiff must allege abuse of power of government to coerce behavior as a part of the due process case. *See also* note 12 *infra*.

substitution for the Court's prior jurisprudence. Rather it is a crafted point, like *Paul v. Davis*, that demarcates ordinary tort from constitutional tort in the situation where, because of the coercive power of the state, a citizen becomes uniquely vulnerable to injury.[12] *City of Canton*, as have all of this Court's prior Section 1983 cases, deals with the wielding of governmental power, not workplace safety.

Petitioner is avowedly seeking the opportunity to supplant the carefully developed state workers' compensation systems and thereby give public employees an additional remedy not generally available to their private counterparts. To soften the force of this would-be grant of an extra cause of action to millions of public employees, Petitioner argues that it is already the law and cites some thirty-five decisions of this Court as demonstrating that public employees are entitled to greater constitutional protection than private employees. Petitioner's Brief at

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[12] M. Wells & T. Eaton, *Substantive Due Process and the Scope of Constitutional Torts*, 18 GA. L.REV. 201, 229 (1984), elaborate on the rationale: "One difference between governmental and private tort flows from the special role of government as keeper of public order. Because of that role, statutes and common law rules accord government actors broad discretion to use force without fear of civil or criminal liability. Individuals generally acquiese in governmental threats and use of force in circumstances where they might either resist or flee or turn to government for help if similarly threatened or harmed by some private person. For this reason, victims are more vulnerable to the exercise of illegitimate or excessive force by government actors. The individual will often be less willing and less able to resist or escape a beating inflicted by the police officer than, for example, a beating inflicted by a drunk in a bar." (footnotes omitted).

27-28. The City has no quarrel with those cases; indeed, many are essential landmarks of our constitutional order. All of them involve violation of a specific constitutional guarantee; and therefore, conversely none involves a generalized due process claim for personal injury. When put together neither they nor any other cases offer any support for Petitioner's argument that public employees are entitled to bring ordinary tort actions clothed as constitutional claims against their governmental employers. With the exception of the aberrational Eighth Circuit decision in *Ruge*, Petitioner cites no case comparable to the instant case where a plaintiff prevailed. Petitioner's lack of cited authority is for good reason – there is none. This Court's decisions require that when one brings a generalized due process claim, there must be a showing that a government official, by reason of government position, was able to impose a loss on an individual.

While Petitioner contends that an abuse of governmental power is not a requisite to a Section 1983 claim, she attempts to cover her argument by asserting that the higher degree of fault required by *City of Canton* establishes the abuse of power. Thus Petitioner offers this Court two opportunities to implement her system of converting ordinary state law torts into constitutional torts: First, Petitioner argues that an abuse of government power is not a requirement of a Section 1983 claim and second, Petitioner argues that if abuse is required, the degree of fault can be used to establish the abuse. Neither conclusion is supported by the Constitution nor this Court's decisions. Instead, both the Constitution and prior decisions demand splitting constitutional torts from common law torts. When the claim is a violation of due

process, the Constitution requires that a plaintiff demonstrate that the government has abused its coercive powers. That is, the governmental entity must have acted as government toward the citizen as governed using its coercive power possessed because it is the government and must have done so with the requisite degree of fault – which is deliberate indifference to the rights of its citizens, through inadequate training or otherwise.

Presence in a case of the alleged requisite degree of fault does not obviate the requirement for the also requisite abuse of governmental power. The degree of defendant's culpability alone does not give rise to a constitutional violation. A defendant must both have violated some right afforded specific constitutional protection (i.e., Bill of Rights guarantees, privacy, invidious discrimination) or in a generalized due process claim have abused the coercive powers of government, and done so with the requisite degree of fault. *See Rochin v. California*, 342 U.S. 165 (1952).

C. POLICY CONSIDERATIONS UNDERLYING FEDERALISM DEMAND A CLEAR DEMARCATION BETWEEN ORDINARY TORTS AND CONSTITUTIONAL VIOLATIONS

This is the first case since *Paul v. Davis* where the Court is faced with a garden variety tort and, therefore, the first case against a governmental entity for a generalized due process violation not involving alleged misconduct by law enforcement officers. In cases involving municipal liability since *Monell*, this Court has dealt with two overriding concerns: what constitutes an official policy, *Oklahoma City v. Tuttle*, 471 U.S. 808 (1985); *Pembaur v.*

City of Cincinnati, 475 U.S. 469 (1986); *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988), and under what circumstances do the actions of the police create liability. *Tuttle*; *City of Canton*. But just as certainly as someone would file a suit like *Paul v. Davis* under Section 1983 after *Monroe v. Pape*, it was inevitable that a case similar to the instant one would follow *Monell*. And just as this Court noted in *Paul v. Davis* that, "[i]t is worth contemplating what the result would be if the strained interpretation of 1443(1) urged by the individual petitioners were to prevail," 424 U.S. at 898 (quoting *Greenwood v. Peacock*, 384 U.S. 808, 832 (1966)), one should do the same here. If Petitioner's theory prevails, the floodgates will be opened. All public employees suffering on the job injuries will have a way, first, to collect workers' compensation and, then, to head for federal court with a Section 1983 action alleging that their employer was deliberately indifferent in its workplace supervisory policies.

First, although Petitioner asserts only a damages claim, she explicitly demands a change in the way the City operates its Sanitation and Sewer Department. Should she prevail, there will be no need for a future plaintiff to be so limited in a request for relief. Since the proof for damages – deliberate indifference plus injury – will satisfy the necessary elements for structural relief,[13] the workplace injury lawsuit of the future will, like the prison conditions suit in *Wilson v. Seiter*, 59 U.S. Law Week 4671 (June 17, 1991), combine a damages claim with a request for institutional relief.

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[13] At least where an injured plaintiff intends to return to the job.

Second, a few examples will quickly demonstrate how completely Petitioner would have this Court convert Section 1983 and the Fourteenth Amendment into an ordinary tort scheme.[14] Certain employees who work at keyboards will develop carpal tunnel syndrome from the repetitive wrist movements. If an employer has enough employees working at keyboards, some employees will eventually develop carpal tunnel syndrome, requiring them to take time off work or possibly to undergo corrective surgery. Assuming that the employer knew that some employees would develop the syndrome, if the employee works for a governmental entity, then the employee, after collecting workers' compensation, may bring a Section 1983 action alleging that the employer was deliberately indifferent to the employee's liberty, personal security, and safety. Other employees may sue for back injuries brought on by lifting heavy objects, for a slip and fall in a puddle of spilled water, or for a heart attack allegedly brought on by work-induced stress. Thousands of ordinary torts will suddenly become constitutional torts so long as the employee alleges the magic words "deliberate

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[14] Even commentary arguing the Court has improperly restricted § 1983 recognizes the necessity of finding an abuse of power and separating constitutional torts from state torts. *E.g.*, S. Bandes, *Distinguishing a Custom or Policy from a Random, Unauthorized Act*, 72 Iowa L.Rev. 101 (1986): "If a state has abused official power and violated the Constitution. . . ." *Id.* at 162; "*Monell* and *Parratt* thus provide a largely successful means of allocating due process claims between state and federal forums, reserving *serious constitutional* claims for federal scrutiny. . . ." *Id.* at 116 (emphasis added).

indifference." By alleging the further magic words "custom or policy," the public employee may not only sue his fellow employees but also his public employer.

Petitioner argues that these ordinary tort cases will not become constitutional torts because of the higher proposed degree of fault required for these new constitutional cases. This assertion is simply not correct. The lines between ordinary negligence, gross negligence, reckless disregard, and conscious indifference are fuzzy ones. Our courts are not equipped to dispose of these cases by motions to dismiss or motions for summary judgment. It will be a fact issue for a jury to decide whether the acts, omissions, lack of training, etc. of an employer rise to the fault level of deliberate indifference. Thus, by simply invoking the magic words in the complaint, the employee will be able to convert an ordinary tort case into a federal constitutional one because all legal boundaries or standards for what constitutes a constitutional tort will have been abandoned and replaced by a factual standard dealing only with the degree of fault of the governmental entity.

Even if it is conceded that workplace training should be improved, Petitioner has selected the wrong forum. Petitioner offers only a generalized due process claim and the area where such a claim is appropriate is when the state uses its coercive power to curtail liberty. To observe the obvious, a governmental employee is neither in temporary custody like Geraldine Harris, nor in lengthy confinement like Pearly Wilson, much less the victim of deadly force like Albert Tuttle. Petitioner, however, sees decisions about where Americans work as determined by forces beyond control, even more determined than where

Joshua DeShaney would live. Thus Petitioner attempts, Brief at 32, to blur distinctions between workplace options and constitutionally approved custody by the expedient of ignoring reality: decisions where citizens choose to work are neither made nor enforced by governments. Given the Thirteenth Amendment it could not be otherwise.

If there is a need to transform governmental workplace supervision in our federal system, the primary actors are state and local officials. Those failing, the other appropriate forum is the Congress, which may, if necessary, pass preemptive legislation regulating workplace safety. *United States v. California*, 297 U.S. 175 (1936). Until such legislation is enacted, this lawsuit, as both courts below intuitively recognized, was brought in the wrong forum.

II. THE TEXAS HAZARD COMMUNICATION ACT DOES NOT CREATE A SUBSTANTIVE DUE PROCESS LIBERTY INTEREST OR "ENTITLEMENT" FOR MUNICIPAL EMPLOYEES

Petitioner alternatively claims that a Texas statute – the Texas Hazard Communication Act – creates substantive due process rights in municipal employees that were violated by the City. TEX. HEALTH & SAFETY CODE ANN. 502.000 et seq. (Vernon 1991). This claim is nothing short of breathtaking. First, it rests on the premise that state statutes protecting employees from various harms create substantive Fourteenth Amendment rights enforceable in federal courts. Second, it requires reading the Texas Hazard Communication Act (a) to create constitutional rights, while (b) simultaneously ignoring what the statute does

say about enforcement.[15] Third, by federalizing state law, it would freeze the ability of states to experiment with workplace safety (and other) laws.

Petitioner's argument is supported by neither precedent nor logic. State statutes, no matter how enlightened, do not change substantive constitutional rights. This is not to say state law has nothing to do with Fourteenth Amendment analysis. Property interests, for instance, are a product initially of the state. Due process then attaches as protection. *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972). Furthermore, procedural due process protects liberty interests, especially from incarceration, created by state law. *Board of Pardons v. Allen*, 482 U.S. 369 (1987); *Mills v. Rogers*, 457 U.S. 291 (1982). But "substantive due process rights are created only by the Constitution." *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 229 (1985) (Powell, J. concurring).

It could hardly be otherwise. Even if it can legitimately be argued that Texans enjoy a higher quality of life than other Americans, this happy circumstance is not the result of the Texas legislature imaginatively creating new federal constitutional rights for its citizens. The sweep of the federal Constitution covers more miles in Texas than in most other states, but every mile is covered

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[15] Petitioner says nothing about the enforcement section of the Texas Hazard Communication Act. Section 13(d) authorizes a $5000 civil fine (and § 13(e) provides for a $25,000 criminal fine) and leaves all other available remedies intact. Petitioner, in fact, continues to receive her workers' compensation remedy.

identically no matter which state is involved. Constitutional rights neither increase nor shrink by a decision to cross the Sabine or Red Rivers or any other American state boundary. We are one nation with one federal Constitution and one set of constitutional rights. Whatever rights the decedents of Collins and Ruge may have, they are not different because the Sixty-ninth Texas legislature passed the Texas Hazard Communication Act and the Kansas legislature did not.

While parades of horribles normally have limited utility, the thrust of Petitioner's argument is simply staggering. The claim of constitutional right (personal security as a substantive right because of the Texas statute) would be identical if Collins, rushing out of the sewer because of lack of oxygen had broken his leg. Indeed, if in a rush out of the sewer his wrist watch were destroyed that, too, would be a constitutional violation because of the newly created protections of the Texas Hazard Communication Act. But sewage and sanitation service employees would not be the sole beneficiaries of this doctrine. All municipal employees would have constitutional rights whenever a governmental unit fell out of compliance with applicable state safety laws. If a state passed legislation to protect workers who spend their days looking at computer screens and a municipality did not implement the law, or properly train its supervisors regarding it, then its employees' injuries resulting therefrom would rise to the level of constitutional violations.[16]

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[16] By the same reasoning Congress would create substantive Fifth Amendment rights when it adopts workplace regulations aimed at protecting employees. While this would not

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The necessary result of Petitioner's argument is a triple assault on federalism. First, as already noted, it makes constitutional rights turn on the happenstance of residence when federalism mandates that the Constitution be fairly and uniformly enforced wherever Americans find themselves in this land. Second, federalism mandates that federal authority leave state spheres alone. *Martinez v. California*, 444 U.S. 277, 282 (1980). Third, it defeats the purpose of a federal system by penalizing experimentation with varieties of laws and enforcement mechanisms. If states are to be laboratories of the nation, *New State Ice v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J. dissenting), then one step at a time implementation of laws, *Railway Express Agency v. New York*, 336 U.S. 106 (1949), must be a reality. Inflating a statutory protection into a constitutional right denies the state the various intermediate choices a legislature must have when it decides to act.

Whether or not a state passes given workplace safety laws (or any other laws) is not a concern of the national government (unless state action is required by applicable federal law). *Compare Steward Machine v. Davis*, 301 U.S. 548 (1937), *with Missouri v. Jenkins*, 110 S.Ct. 1651 (1990). Furthermore, state enforcement of state law is not a national concern. Just as each state has complete freedom to adopt laws appropriate to its circumstances, so, too, each state may select enforcement procedures as it

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have federalism problems, it would be very hard to square with decisions on implied causes of action. *Cort v. Ash*, 422 U.S. 66 (1975).

wishes. Thus a state may have a law on the books but choose, for whatever reasons, not to enforce it. *Bowers v. Hardwick*, 478 U.S. 186 (1986). That is a sovereign prerogative. Similarly, a state may impose exceptionally strong penalties for the violation of a law when other states would not. *Harmelin v. Michigan*, 59 U.S. Law Week 4839 (June 27, 1991). Unless a specific constitutional barrier is breached, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), all these decisions are the exclusive province of state law. Thus it is of no national concern whether Texas enforces the Texas Hazard Communication Act to the letter or leaves it dead on the books as a sop for a once successful lobbying effort. These concerns and choices may be of interest to political scientists, but the decision is for Texans, not for representatives of the federal government.

The choices made by the Texas legislature are like the choices made by Congress. Sometimes a statute carries a full panoply of enforcement mechanisms; sometimes enforcement is left exclusively in administrative hands. Even more than the separation of powers limitations that influence decisions to imply a private cause of action, *Cort v. Ash*, 422 U.S. 66 (1975), federalism creates an impregnable constitutional barrier from functionally creating an implied federal cause of action for violation of a state statute. If Petitioner is concerned with past violations of the Texas Hazard Communication Act, then she should devote her efforts toward having the Division of Occupational Safety and Health of the Texas Department of Health seek civil or criminal penalties under Section 13 of the Act.

Petitioner's argument is not only wrong, it is unconstitutional.[17] The Texas Hazard Communication Act is but a statute; it may be a very good one, but it creates no constitutional rights. Indeed the Constitution itself precludes such an outcome. Texas is free to have such a statute or not. Texas is free to enforce its laws to the hilt or let some, including this one, lay fallow. Any other conclusion would reduce federalism to a slogan rather than a living constitutional reality.

Furthermore, even if Texas law created a liberty or property interest applicable to this case, Petitioner misunderstands the significance of such a conclusion. Since substantive rights are created only by the Constitution, the most that the Texas statute could create for Petitioner is procedural due process protections. *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 229 (1985) (Powell, J., concurring). In view of this critical distinction, it is necessary to look at the procedural due process afforded by Texas in the current situation, a matter completely ignored by Petitioner.

It is undisputed that Texas provides those in Petitioner's position with a workers' compensation remedy for damages. Such a post-deprivation remedy is sufficient to satisfy due process requirements. *See Ingraham v. Wright*, 430 U.S. 651, 674-82 (1977). Requiring a pre-deprivation hearing would obviously make no sense under the facts of this case. *See Parratt*, 451 U.S. at 541-44; *Hudson v.*

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[17] The City agrees with Petitioner that this case can be disposed of without reaching this issue. Nevertheless, the issue is purely legal and its answer is obvious. Under the circumstances judicial economy would be served by saying so.

Palmer, 468 U.S. 517, 534 (1984). Thus, the Court has previously explained that there is no constitutional mandate for a prior hearing in the

> many circumstances in which the state's conduct, if not adequately justified, would constitute a common law tort. This would leave the injured plaintiff in precisely the same posture as a common-law plaintiff, and this procedural consequence would be quite harmonious with the substantive view that the Fourteenth Amendment encompasses the same liberties as those protected by the common law.

Ingraham, 430 U.S. at 679 n.47 (quoting Monaghan, *Of "Liberty" and "Property"*, 62 CORNELL L.REV. 405, 431 (1977)). Since Texas' statutory remedy satisfies this standard, it meets any procedural due process requirement that might be required in this case.

As this Court stated in *Daniels v. Williams*, 474 U.S. at 322, the Constitution does not exist to supplement traditional tort law: "Our Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society." Petitioner has whatever remedies she might have under traditional tort law; she does not, however, have a Section 1983 claim against the City.

CONCLUSION

Petitioner's argument, if adopted, would convert Section 1983 into an ordinary tort statute. Petitioner would have a governmental entity held liable to a government employee whenever a certain standard of fault is met, regardless of whether there is an abuse of government power. This Court has repeatedly stated that it will not so convert Section 1983. The Fifth Circuit correctly understood the clear position of this Court on that subject when it wrote in *Rankin*: "[T]o predicate liability under Section 1983 totally on the mere degree of fault would be to convert the due process clause into an ordinary tort statute and to lose sight of the fact that Section 1983 is directed at the abuse of power made possible only because the wrongdoer is clothed in the authority of State law." 762 F.2d at 447-48.

For all of the foregoing reasons, Respondent, the City of Harker Heights, Texas, respectfully requests that the Court affirm the judgment of the Court of Appeals.

Respectfully submitted,

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